STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of AEG and LEG, Minors.

UNPUBLISHED
November 7, 2013

No. 316599
Jackson Circuit Court
Family Division
LC No. 12-005262-AM

Before: MURRAY, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Petitioners appeal as of right from the order of the trial court dismissing their petitions to adopt the minor children. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Petitioners are the maternal grandparents of four siblings: AC, JC, LG, and AG. Child protective proceedings were initiated against the siblings' biological parents, and in November of 2009, the three older siblings (AC, JC, and LG) were removed from their biological mother and placed with petitioners. AG was subsequently born in February of 2010 and was placed in a licensed foster home, because petitioners did not believe they were able to care for her at that time. In the summer of 2010, the four siblings were returned to their biological mother pursuant to a reunification plan. Reunification was unsuccessful, however, and the four siblings were removed from their biological mother on September 24, 2010. At that time, only the two oldest siblings, AC and JC, were placed with petitioners, as petitioners did not believe they were able to care for all four siblings. LG and AG were placed together in a licensed foster home. On October 6, 2010, petitioners requested that AC and JC be removed from their home, at least in part because petitioners did not believe they could provide the requisite care at that time. AC and JC were placed with a family friend and later with a maternal aunt. On May 23, 2011, at the maternal aunt's request, AC and JC were removed and were placed back with petitioners.

On May 31, 2011, the trial court terminated the parental rights of the siblings' biological parents and they were committed to respondent Department of Human Services (DHS) and its adoption unit, the Michigan Children's Institute (MCI). AC and JC continued their placement with petitioners, while LG and AG continued their foster placement. In July of 2011, petitioners began working toward adopting all four siblings. On July 12, 2012, MCI denied consent to petitioners' request to adopt LG and AG; however, MCI did not deny consent to petitioners'

request to adopt AC and JC. On August 31, 2012, petitioners filed a motion under MCL 710.45(2), contending that MCI's denial of consent as to LG and AG was arbitrary and capricious. LG and AG moved into a new foster home, which the record indicates was a potential adoptive placement for LG and AG. MCI subsequently consented to petitioners' adoption of AC and JC; and the trial court finalized this adoption in February of 2013. Thereafter, in April of 2013, the trial court held a Section 45[1] hearing on petitioners' motion to reverse MCI's denial of consent to adopt LG and AG. The trial court denied petitioners' motion, finding that the MCI superintendent's decision was not arbitrary or capricious; and the court granted respondent's motion to dismiss petitioners' petitions to adopt LG and AG.

III. STANDARD OF REVIEW

Judicial review of the withholding of consent to an adoption is governed by MCL 710.45." *In re Cotton*, 208 Mich App 180, 183; 526 NW2d 601 (1994).

> Pursuant to MCL 710.45, a family court's review of the [MCI] superintendent's decision to withhold consent to adopt a state ward is limited to determining whether the adoption petitioner has established clear and convincing evidence that the MCI superintendent's withholding of consent was arbitrary and capricious. Whether the family court properly applied this standard is a question of law reviewed for clear legal error. [*In re Keast*, 278 Mich App 415, 423; 750 NW2d 643 (2008).]

"The generally accepted meaning of 'arbitrary' is 'determined by whim or caprice,' or 'arrived at through an exercise of will or caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned.'" *Id*. at 424 (internal quotation marks and citations omitted). "The generally accepted meaning of 'capricious' is 'apt to change suddenly; freakish; whimsical; humorsome.'" *Id*. at 424-425 (internal quotation marks and citations omitted).

We review "de novo questions of law, such as statutory interpretation." *Thomas v New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2002).

With respect to unpreserved issues, this Court's review "is limited to plain error affecting substantial rights." *In re Utrera*, 281 Mich App at 9, citing *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999). Under the plain error rule, a respondent must show that an obvious error occurred and "that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763.

[1] MCL 710.45.

III. THE TRIAL COURT'S REVIEW OF MCI'S ADOPTION DECISION

On appeal, petitioners argue that the trial court erred by considering MCI's July 12, 2012 consent decision as evidence, by misapplying the arbitrary and capricious standard, and by determining that MCI's denial of consent was not arbitrary and capricious. We disagree.

In this case, MCI's July 12, 2012 denial of adoption consent stated that "[a]fter careful review of all the information provided, it does not appear to be in the best interests of" LG and AG to be adopted by petitioners. MCI's July 12, 2012 decision further stated that its denial of adoption consent was based on multiple factors, including petitioners' past statements of ambivalence or reluctance to parent the children, petitioners' failure to "understand the risk to the physical and emotional wellbeing of the children that would result from contact with the birth mother[,]" and the fact that petitioners had not provided for LG's care since June 30, 2010 and had never provided for AG's care. According to MCI's denial of consent, the private adoption agency working with petitioners and the children's lawyer guardian ad litem (LGAL) believed that petitioners did not understand the risk of harm associated with contact between LG and AG and their birth mother, and the agency and LGAL were concerned that petitioners would allow such contact to occur.

Petitioners attached MCI's July 12, 2012 decision to their August 31, 2012 motion to reverse MCI's denial of adoption consent, and respondent attached MCI's decision to its Section 45 hearing brief. At the Section 45 hearing, the trial court stated: "My focus, as I evaluate whether the decision was arbitrary and capricious, is the decision itself." The trial court noted, however, that although the July 12, 2012 decision was attached to prehearing filings, neither party actually introduced it as an exhibit at the Section 45 hearing.

On appeal, petitioners argue for the first time that the trial court improperly considered MCI's July 12, 2012 consent decision as evidence, although it was not admitted as an exhibit at the Section 45 hearing. Petitioners had an opportunity and did not object below to the trial court's consideration of MCI's July 12, 2012 decision, and our review of petitioners' challenge on appeal is "limited to plain error affecting substantial rights." *In re Utrera*, 281 Mich App at 9.

Both parties provided the trial court with MCI's July 12, 2012 decision before the Section 45 hearing, and the trial court treated it as admitted evidence after noting the parties' failure to introduce it as an exhibit at the actual hearing. MCR 3.800 provides that adoption proceedings are governed by the Michigan Court Rules except as modified by MCR 3.801-3.8067. MCR 2.613 provides that an error in the admission of evidence is not grounds for setting aside an order, "unless refusal to take this action appears to the court to be inconsistent with substantial justice." Where petitioners presented the evidence to the trial court and failed to object to the trial court's consideration of it as evidence at the Section 45 hearing, they should not now be allowed relief on the basis that the trial court's action in considering the decision as evidence was inconsistent with substantial justice. Moreover, at the Section 45 hearing, petitioners implicitly relied on MCI's July 12, 2012 written decision to establish MCI's basis for denial; petitioners did not call the MCI superintendent as a witness or introduce any affidavit or other document (apart from the decision itself) establishing MCI's basis for denial. Therefore, if MCI's written decision was not properly before the trial court, petitioners would have had no basis by which to

meet their burden of establishing by clear and convincing evidence that MCI's consent decision was arbitrary and capricious. MCL 710.45(7). In sum, petitioners have not demonstrated that the trial court's consideration of MCI's July 12, 2012 decision constituted plain error affecting their substantial rights. *In re Utrera*, 281 Mich App at 9.

Petitioners also contend that the trial court clearly erred by misapplying the "arbitrary and capricious" standard and not finding that MCI's denial of adoption consent as to LG and AG was arbitrary and capricious. As discussed above, MCI's July 12, 2012 decision stated that the denial of adoption consent was based on multiple factors, including petitioners' failure to understand the risk of harm to the children that would result from contact with their biological mother and the fact that petitioners had not provided for LG's care since June 30, 2010 and had never provided for AG's care. However, in petitioners' motion under MCL 710.45(2), and in their Section 45 hearing brief, petitioners incorrectly characterized MCI's basis for denial as relying solely on petitioners' alleged statements of inability or unwillingness to parent the children. At the Section 45 hearing, petitioners focused entirely on their alleged statements that they were unable or unwilling to parent the children, and they did not address MCI's other reasons for denial of adoption consent. At the hearing, petitioners acknowledged that AG had never been under their care and that LG had not been under their care since approximately June 30, 2010. The maternal grandmother testified that when the children were at petitioners' house in the past, the birth mother "could come pretty much whenever she wanted to come." This supports MCI's conclusion that petitioners did not understand the risk of harm with respect to contact between LG and AG and their birth mother.

The trial court found that the evidence of petitioners' past ambivalence or reluctance to parent the children—if it were the sole basis for MCI's denial of adoption consent—would constitute an arbitrary or capricious reason to deny petitioners consent to adopt LG and AG. However, the trial court then found that petitioners had not established by clear and convincing evidence that MCI's alternate bases for denial of adoption consent were arbitrary and capricious. Reversal is improper where MCI articulates any legitimate reason for denial. *In re Keast*, 278 Mich App at 425 (emphasis added) ("It is the absence of *any* good reason to withhold consent, rather than the presence of good reasons to grant it, that indicates that the decision maker has acted arbitrarily and capriciously."). On the record before us, the trial court did not misapply the relevant standard or clearly err in finding that petitioners failed to establish by clear and convincing evidence that MCI lacked any basis for denial that was not arbitrary or capricious. *Id*. at 424-425; *In re Cotton*, 208 Mich App at 184.

IV. STATUTORY PREFERENCE FOR RELATIVE PLACEMENT

Petitioners next argue that the trial court erred by not applying the statutory preference for relative placement under MCL 722.954a(5) to MCI's adoption decision. We disagree.

We review de novo questions of statutory interpretation. *Thomas*, 254 Mich App at 201.

> The goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed, and a court must enforce the statute as written. Words and phrases in a statute shall be construed

> and understood according to the common and approved usage of the language. [*In re Conservatorship of Townsend*, 293 Mich App 182, 187; 809 NW2d 424 (2011) (citations omitted).]

MCL 722.954a(5) provides, in relevant part:

> Before determining placement of a child in its care, a supervising agency shall give special consideration and preference to a child's relative or relatives who are willing to care for the child, are fit to do so, and would meet the child's developmental, emotional, and physical needs. The supervising agency's placement decision shall be made in the best interests of the child.

A review of the plain and unambiguous language of MCL 722.954a indicates that the Legislature intended the statute to provide procedural requirements where a child is removed pursuant to a child protective proceeding; there is no indication that the statute was intended to apply to MCI's adoption decisions after termination. See MCL 722.954a(2); MCL 722.954a(3)(a); MCL 722.954a(4)(a). See also *In re Conservatorship of Townsend*, 293 Mich App at 187 ("If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed, and a court must enforce the statute as written."). Moreover, petitioners do not cite to any case applying MCL 722.954a in the context of an adoption proceeding or a Section 45 hearing. There is no basis for this Court to conclude that MCL 722.954a(5) applies to MCI's adoption decision.[2]

Moreover, even if this Court were to find that MCL 722.954a(5) applies to MCI's decisions regarding whether to grant consent to adopt, we would not find that MCI or the trial court is required to consent to relative adoption under MCL 722.954a(5). In the context of child protective proceedings, this Court has held that the trial court is not required to place a child with relatives. See *In re IEM*, 233 Mich App 438, 453; 592 NW2d 751 (1999), rev'd on other grounds by *In re Morris*, 491 Mich 81; 815 NW2d 62 (2012); *In re McIntyre*, 192 Mich App 47, 52; 480 NW2d 293 (1991).

In the instant case, the trial court held that MCL 722.954a(5) articulates a preference for relative placement, not a mandate. The trial court correctly ruled that its review of respondent's denial of adoption consent was limited to whether that denial was arbitrary and capricious and made its ruling on the basis of its finding that the decision was not arbitrary or capricious. Petitioners are not entitled to relief on the basis of MCL 722.954a(5).

V. PARTICIPATION OF THE LGAL

Finally, petitioners argue that the LGAL's participation in the Section 45 hearing constituted error requiring reversal. We disagree.

[2] Michigan courts routinely consider placement with relatives in the context of child protective proceedings under MCL 712A.19b. See *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010); *In re Olive/Metts*, 297 Mich App 35, 43; 823 NW2d 144 (2012).

At the Section 45 hearing, petitioners contended that the LGAL "has no role in this proceeding." In response, the trial court ruled:

> There is an extensive list of powers and duties of an LGAL that makes it clear first of all that the LGAL's appointment continues until jurisdiction over the children is terminated.
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> * * *
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> So even if there weren't specific statutory authority for the LGAL's participation in this hearing today, I'm going to order it. I want the LGAL to participate. . . . I want the LGAL to have input because of her involvement throughout the time that the court has had jurisdiction over these children.

"In Michigan, adoption proceedings are governed entirely by statute. Section 24a(1) of the Adoption Code, MCL 710.24a(1), specifically enumerates who is considered an interested party in adoption proceedings." *In re Toth*, 227 Mich App 548, 554; 577 NW2d 111 (1998). In this case, the LGAL was not an interested party under MCL 710.24a(1). However, other statutes make clear the Legislature's intent that the LGAL should be involved in the adoption proceedings regardless of whether the LGAL is an interested party under MCL 710.24a(1). For instance, MCL 710.45(5) provides that "[t]he court shall provide notice of a motion brought under this section to all interested parties as described [MCL 710.24a(1)], *the guardian ad litem of the prospective adoptee if one has been appointed during a child protection proceeding*, and the applicant who received consent to adopt." (Emphasis added.) MCL 400.204(2) provides:

> During the time a child is committed to the superintendent of the Michigan children's institute, the superintendent and the child's attorney may communicate with each other regarding issues of commitment, placement, and permanency planning; and if the child's attorney has an objection or concern regarding such an issue, the superintendent and the child's attorney shall consult with each other regarding that issue.

Moreover, MCL 712A.17d(1)(b) provides that the LGAL's "powers and duties include . . . [t]o serve as the independent representative for the child's best interests, and be entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child." In light of the foregoing statutory provisions, as well as our review of the lower record, petitioners are not entitled to relief on the basis of the LGAL's participation in this case.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra